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No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

THOMAS R. HOSKINS, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Due Process Clause of the Fifth Amendment prevent the reassessment of sentences by intermediate appellate courts where a conviction and sentence are set aside by the Court of Military Appeals for legal error?

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UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Thomas R. Hoskins, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Military Appeals rendered in this proceeding.

OPINIONS BELOW

The unpublished order of the United States Court of Military Appeals, *United States v. Hoskins,* Dkt. No. 67486/AR (C.M.A. January 4, 1994) is reprinted as Appendix A at 1a. The Order of the United States Court of Military Appeals denying petitioner's Petition for Reconsideration, *United States v. Hoskins,* __ M.J. __, (C.M.A. February 7, 1994) is reprinted as Appendix B, at 2a. The unpublished opinion of the United States Army Court of Military Review, *United States v. Hoskins,* No. 8903849,

(A.C.M.R. November 16, 1993) is reprinted as Appendix C at 3a. The published opinion of the United States Court of Military Appeals, setting aside the findings and sentence of petitioner's case, *United States v. Hoskins,* 36 M.J. 343 (C.M.A. 1993) is reprinted as Appendix D, at 6a, and the original unpublished opinion of the United States Army Court of Military Review, *United States v. Hoskins,* No. 8903849, (A.C.M.R. November 6, 1991) is reprinted as Appendix E, at 19a.

JURISDICTION

The jurisdiction of this Court is based upon 28 U.S.C., § 1259(3) (Supp. 1992). On January 4, 1994, the United States Court of Military Appeals granted discretionary review of petitioner's case, *United States v. Hoskins,* Unpublished Order, No. 67486/AR, (C.M.A. January 4, 1994), App. A, and summarily affirmed the decision of the United States Army Court of Military Appeals denying petitioner's Petition for Reconsideration. App. B.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be . . . deprived of life, liberty or property, without due process of law . . ."

Article 67(e) of the Uniform Code of Military Justice, [hereinafter U.C.M.J.], 10 U.S.C. § 867(e) provides:

> If the Court of Military Appeals sets aside the findings and sentence, it may . . . order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

Relevant portions of Articles 52 and 118, U.C.M.J. are reproduced as Appendix G at 34a. Rules for Courts Martial 501, 1002 and 1006 are reproduced as Appendix H at 35a.

STATEMENT OF THE CASE

During November and December, 1989, Private First Class [hereinafter PFC] Hoskins was tried at Frankfurt, Germany on a single charge of premeditated murder by a general court-martial composed of officer and enlisted members [hereinafter the jury].[1] PFC Hoskins pleaded not guilty, but nevertheless was convicted of premeditated murder. After entering a finding of guilt, petitioner's trial entered the penalty phase and the military judge instructed the jury that they could not adjudge a term of confinement, since a sentence to life imprisonment was an automatic penalty under the law for a conviction of premeditated murder. The jury adjudged a sentence of life imprisonment, reduction to paygrade E-1, forfeiture of all pay and allowances, and to be discharged from the Army with a Dishonorable Discharge.

After his court-martial, four of the six jurors on petitioner's panel expressed surprise that a sentence to confinement for life was an automatic penalty, and those four urged the convening authority to extend clemency by reducing the term of confinement to no more than 25 years.[2] The convening authority approved the sentence of the court-martial, reducing confinement to a period of 40 years.

On appeal to the United States Army Court of Military Appeals, the findings and sentence of petitioner's case

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[1] Court-martial members are the functional equivalent of a jury.

[2] One juror felt that a sentence of ten years was sufficient, while three jurors endorsed a sentence of not more than 25 years. See App. F at 6a.

were affirmed. App. E. On further appeal to the United States Court of Military Appeals, the findings and sentence of petitioner's court-martial were set aside, and petitioner was found guilty only of unpremeditated murder, which does not carry a mandatory sentence of confinement. The United States Court of Military Appeals remanded petitioner's case back to the United States Army Court of Military Review for a "reassessment" of petitioner's sentence in light of the affirmed finding of guilt as to unpremeditated murder. App. D.

On remand to the United States Court of Military Review, petitioner sought a further remand to the trial court level for a rehearing on sentence, claiming that without such a rehearing, petitioner would be denied due process of law. The United States Army Court of Military Review denied petitioner's request and reassessed petitioner's adjudged sentence to confinement, reducing approved confinement from 40 years to 30 years. App. C.

On further appeal to the United States Court of Military Appeals, that Court granted discretionary review of petitioner's case, finding the action of the Court below to be adequate as a matter of law. App. A. Petitioner sought reconsideration, which was denied. App. B.

REASONS FOR GRANTING THE WRIT

By remanding this case to the United States Army Court of Military Review for "reassessment" of petitioner's sentence, the United States Court of Military Appeals acted beyond their statutory authority mandated by Article 67(e), U.C.M.J.

The Constitution gives Congress the power to "make rules for the government and regulation of the land and naval forces". Article I, § 8, cl. 14. It has done so by enactment of the Uniform Code of Military Justice, 10 U.S.C.

§ 801, et seq. (1950, 1982 and 1988). The powers of the Courts of Military Review and the United States Court of Military Appeals are set forth at 10 U.S.C. §§ 866 and 867, respectively.

The authority of the Courts of Military Review generally includes the power of plenary, de novo review of law and fact, *United States v. Cole,* 31 M.J. 270 (CMA 1991), and review of the appropriateness of sentence. If a Court of Military Review sets aside the findings of a court-martial, it may "reassess" a sentence as a function of its statutory power to review a sentence as "correct in law and fact". Article 66(c), Uniform Code of Military Justice, 10 U.S.C. 866(c). *Jackson v. Taylor,* 353 U.S. 569, (1956).

The authority of the United States Court of Military Appeals is also prescribed by statute, and generally provides that Court with authority to exercise discretionary review on questions of law only.[3] Article 67(d), U.C.M.J., 10 U.S.C. § 867(d). Specifically, with respect to cases in which the findings and sentence of a court-martial are set aside, as here, Congress has given the United States Court of Military Appeals authority only to authorize a rehearing or to dismiss the charges. Article 867(e), U.C.M.J., 10 U.S.C. 867(e).

Specifically, Article 67(e), U.C.M.J., governs the actions the United States Court of Military Appeals may take when setting aside the findings and sentence of a court-martial, as here. That Court may either remand the case of an appellant for a "rehearing" or it may "dismiss the charges." Congress did not authorize the Court to remand cases it sets aside to an intermediate court of Military Review for "reassessment" of a sentence.

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[3] In *Noyd v. Bond,* 395 U.S. 683, 695 (1969). This Court affirmed the additional jurisdiction of the Court of Military Appeals under the All Writs Act, 28 U.S.C. § 1651(a).

"Reassessment" is not synonymous with a "rehearing." A reassessment "does not provide the accused an opportunity to be present or to offer new evidence in mitigation and extenuation," whereas a rehearing does. *United States v. Sales,* 22 M.J. 305, 307 (CMA 1986).

In *Sales,* the United States Court of Military Appeals stated that, where error occurred at the trial level as to findings or sentence a Court of Military Review may reassess the accused's sentence, if it is convinced that, even if no error had occurred at the trial level, an accused's sentence would have been at least of a certain magnitude. *Id.,* at 307. In such a case, it may adjudge no greater sentence than the court-martial would have, had the error not occurred.

Since *Sales,* the Court of Military Appeals has remanded the cases of many military members to the Courts of Military Review for sentence reassessment, and petitioner is unaware of any case in which the practice has been challenged on due process grounds.

More recently in *United States v. Peoples,* 29 M.J. 426 (CMA 1990), the United States Court of Military Appeals set aside the appellant's sentence as reassessed by the Court of Military Review, finding that it was not convinced that the Court of Military Review could accurately have determined what, if any, sentence Peoples would have been adjudged, absent the prejudicial error. In such cases, the Court of Military Appeals stated, "the only fair course of action" is to allow the accused a rehearing on sentence at the trial level. *Id.* at 429.

Military justice is a highly particularized system with many provisions which do not exist in the non-military context. As an example, in the military, sentencing is by

the jury,[4] and Article 52, U.C.M.J., 10 U.S.C. § 852 provides that no person may be sentenced to confinement for more than ten years unless three-fourths of the jurors concur. App. G at 34a.

Here, petitioner, if initially charged and convicted only of unpremeditated murder, would have been entitled to have his jury instructed that they could adjudge a sentence ranging from no punishment to confinement for life, since that is the range of punishment permissible under the provisions of the Manual for Courts-Martial (1984) for unpremeditated murder. Article 118(2), U.C.M.J., 10 U.S.C. § 918(2), App. G at 34a, and R.C.M. 1002 reprinted at App. H. Instead, petitioner was erroneously convicted of premeditated murder for which an automatic sentence to confinement for life is mandated under Article 118(4) of the U.C.M.J., 10 U.S.C. § 918(4). Had petitioner's jury been properly instructed on unpremeditated murder, it is clear that the three-fourths of the jurors necessary to adjudge a sentence in excess of ten years under Article 52, U.C.M.J., 10 U.S.C. § 852, would have adjudged a sentence to confinement of no more than 25 years. App. F and G at 31a and 34a.

The Court of Military Review, however, reassessed petitioner's sentence in an amount 25 percent greater than petitioner's jury would have adjudged if they had been allowed to do so!

> This Court has held that "the Due Process clause protects individuals against two types of government action. So-called 'substantive due process' prevents the government from engaging in conduct which 'shocks the conscience,' . . . or interferes with rights 'implicit in the concept of

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[4] Unless an accused has elected to be tried by judge alone. See Rules for Courts-Martial, (hereafter R.C.M.) 501, 1002 and 1006, reprinted at App. H.

> ordered liberty' (citation omitted). When government action depriving a person of life, liberty or property survives substantive due process scrutiny, it must still be implemented in a **fair manner** . . . This requirement has traditionally been referred to as 'procedural' due process." *United States v. Salerno,* 481 U.S. 739, 746 (1987). (emphasis added)

Although this case appears similar to *Jackson v. Taylor, supra,* decided by this Court 38 years ago, it is dissimilar in several respects, which in the aggregate, warrant a grant of certiorari here.

1. Jackson did not assert a constitutional basis for his argument, *id.* at 572. Petitioner here relies upon the Due Process clause of the Fifth Amendment, asserting that he has been denied procedural due process by the remand of the United States Court of Military Appeals to the Army Court of Military Review for reassessment; an action petitioner asserts is beyond the statutory authority of the former Court which, upon setting aside findings and sentence of a court-martial, may only remand a case for "rehearing", or dismiss the charges.

2. The Court's reasoning in *Jackson* relied heavily upon the fact that the U.C.M.J. was silent as to rehearings on sentence, citing the "impossibility of remand to the same court-martial", and noting that "Congress thought the Board of Review could modify sentences when appropriate more expeditiously, more intelligently and more fairly". *Id.* at 580. In fact, since *Jackson,* Congress has expressly given the Court of Military Appeals authority to remand cases for rehearing, or to dismiss the charges under circumstances present here, under Article 67(e) 10 U.S.C. § 867(e).

3. In *Jackson,* the process unsuccessfully challenged was the practice of the Boards of Review to reassess a sentence when setting aside the findings or sentence of a

court-martial it found to be incorrect in law or fact. Here, petitioner is challenging the action of the Court of Military Appeals, rather than the Courts of Military Review.

4. Since the decision in *Jackson,* military justice has developed substantially with the implementation of a Manual for Courts-Martial, Rules for Courts-Martial, Military Rules of Evidence, and substantial due process protections, such as the right to counsel, which did not exist at the time *Jackson* was decided. Because petitioner is here alleging a denial of procedural due process, he may rely upon all of those statutes and regulations which previously did not exist, to establish the minimum due process he is due.

5. This Court, in *Jackson,* noted the "impracticality" of requiring that a new court-martial be empaneled. *Id.* at 580. Since that decision, however, the entire structure of the military justice system has been dramatically overhauled, including the Military Justice Act of 1968, which created the military bench *in toto*. While it may have been impractical to provide a rehearing in every case set aside on appeal in 1956, such is certainly no longer the case, given the value placed upon due process rights in the intervening years.

6. In *Jackson,* there was no way to determine what, if any sentence Jackson would have received if convicted only of the attempted rape, since he received the automatic sentence to confinement for life for an aggravated murder conviction and in the military, sentencing is in "gross" for all offenses. Here, by virtue of the post trial clemency recommendations of the jurors, it is clear that this petitioner received a reassessed sentence to confinement in excess of that which the jurors would have adjudged for a premeditated murder. In other words, the prejudice to this petitioner can be clearly articulated.

Petitioner asserts that the practice of the United States Court of Military Appeals to remand cases which are legally insufficient to the service Courts of Military Review for sentence reassessment is beyond the statutory authority of that Court. Nowhere has Congress authorized that Court to undertake any action other than ordering a rehearing, or dismissal of the charges when it sets aside the findings and sentence of a court-martial for legal error. "Rehearing" is a term of obvious meaning and is clearly distinguishable from the term "reassessment", which lacks the procedural due process inherent in a rehearing. *Sales, supra,* at 307.

CONCLUSION

Petitioner seeks a Grant of this Petition for Certiorari to obtain an opportunity to have a jury determine his sentence for an unpremeditated murder, an opportunity which he has been denied to date. Petitioner demonstrates prejudice by the imposition here of a punishment on re-assessment which is obviously greater than petitioner would have received had his jury adjudged his sentence for a **premeditated murder.** Such an action by the United States Army Court of Military Review, under these facts, is tantamount to an increase in petitioner's sentence, which the Army Court is forbidden by statute from accomplishing.

Petitioner seeks a grant of this Petition for Certiorari additionally to challenge the current practice of the United States Court of Military Appeals in remanding for re-assessment those cases which, by statute, that Court may only order a rehearing upon.

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